

FILED
Clerk
District Court

FEB 23 2006

For The Northern Mariana Islands
By _____
(Deputy Clerk)

Law Office of G. Anthony Long
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Attorney for Defendant Ana Demapan-Castro

**IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS**

HENRY S. HOFSCHEIDER)	CIVIL ACTION NO. 04-0022
)	
Plaintiff)	
)	
v.)	DECLARATION OF COUNSEL
)	
ANA DEMAPAN-CASTRO)	
)	
Defendant.)	Date: March 30, 2005
)	
_____)	Time: 9:00 a.m.

I, G. Anthony Long, hereby declare as follows:

1. I am the attorney for Ana Demapan-Castro in this case.
2. I represented Ana Demapan-Castro and the former MPLA Board of Directors in a civil suit filed in the Commonwealth Superior Court filed by plaintiff Henry S. Hofschneider arising from his termination from the now defunct position of MPLA Commissioner.
3. I possess personal knowledge of the matters set forth herein.
3. Attached hereto as Exhibit 1 is a copy of the complaint filed by Hofschneider in the Superior Court.
4. Attached to the Complaint as Exhibit A is a copy of Hofschneider's employment contract

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1 signed by Hofschneider.

2 5. Attached to the employment contract is a copy of Hofschneider's job description for the
3 position of MPLA Commissioner signed by Hofschneider.
4

5 I declare under penalty of perjury pursuant to the laws of the United States of America
6 that the above is true and correct and execute this declaration on Saipan, CNMI on this 23rd day
7 of February, 2006.
8
9

10 Law Office of G. Anthony Long

11
12 By: 
13 G. Anthony Long
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EXHIBIT 1

CLERK OF COURT
SUPERIOR COURT
FILED

NOV -9 PM 3:57

DEPUTY CLERK OF COURT

SEAN E. FRINK
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Attorney for Plaintiff Henry S. Hofschneider

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

HENRY S. HOF SCHNEIDER,

Civil Action No. 04- 0523 E

Plaintiff,

-v-

**COMPLAINT FOR JUDICIAL REVIEW
OF TWO ADMINISTRATIVE
DECISIONS AND THE FILING OF
ADDITIONAL CAUSES OF ACTION**

**ANA DEMAPAN-CASTRO, and
MARIANAS PUBLIC LANDS
AUTHORITY BOARD
OF DIRECTORS,**

Defendants,

**I.
THE PARTIES**

1. Plaintiff Henry S. Hofschneider (hereinafter "Commissioner Hofschneider") is an individual employed as the Commissioner of the Marianas Public Lands Authority, residing on the island of Saipan, Commonwealth of the Northern Mariana Islands, a CNMI taxpayer, a person of NMI descent, and a citizen of the United States.

2. Defendant Ana Demapan-Castro, (hereinafter "Demapan-Castro" or "Defendant") is a resident of Saipan, a United States Citizen, and the Chairwoman of the Board of Directors of the Marianas Public Lands Authority, a public corporation established and

1 existing under CNMI Public Law 12-33, as amended by PL 12-71. Defendant is sued in her
3 both her professional and personal capacities.

5 3. Defendant Marianas Public Lands Authority Board of Directors (hereinafter the
7 "Board") is a five-member board of directors of a public corporation and CNMI government
9 instrumentality established and existing under CNMI Public Law 12-33, as amended by PL 12-
11 71, that may be sued in its own name. The Board is named as a defendant to the extent that the
13 Court determines that the acts of Demapan-Castro described below were somehow bidding acts
15 of the Board and for purposes of enjoining further expenditure of MPLA and Board money
17 related to Demapan-Castro's personal acts against Commissioner Hofschneider.
19

21 II. 23 JURISDICTION

25 4. This Court has jurisdiction to hear and decide this matter pursuant to Article IV,
27 Section 2 of the Constitution of the Commonwealth of the Northern Mariana Islands, 1 CMC §
29 3202, and 28 U.S.C. § 1367(d).

31 5. This Court has jurisdiction to review the purported administrative decisions of
33 Demapan-Castro under 1 CMC § 9112(b), the Open Government Meetings and Records Act
35 related items pursuant to 1 CMC §§ 9915 and 9916, and the Taxpayer Action pursuant to
37 Article X, Section 9 of the CNMI Constitution.

39 III 41 RELATED N.M.I. FEDERAL COURT CASE

43 6. Commissioner Hofschneider has filed a 42 U.S.C. §1983 case against Demapan-
45 Castro in her personal capacity in the United States District Court for the Northern Mariana
47 Islands based upon related facts because of her repeated violation of Commissioner
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1 Hofschneider's due process rights and her related acts of retaliation. That case is *Henry S.*
3 *Hofschneider v. Ana Demapan-Castro*, D.N.M.I. Civil Action No. 04-0022.

5 **IV.**
7 **FACTS**

9 **The Employment Contract**

11 7. Commissioner Hofschneider was hired as the Commissioner of MPLA for a four-
13 year period beginning May 5, 2003 pursuant to the terms and conditions of the contract
15 attached hereto as Exhibit "A" and made a part of the Complaint as if fully set forth herein
17 The parties to Commissioner Hofschneider's employment contract were the Board and
19 Commissioner Hofschneider, provided Commissioner Hofschneider a minimum annual salary
21 of \$80,000.00, and among other provisions, provided:

23 a. That the Board could terminate Commissioner Hofschneider's employment
25 without cause upon 60 days advance written notice of termination but in such event the Board
27 would be required to immediately pay Commissioner Hofschneider a lump sum payment for
29 the salary and benefits he would lose during the remainder of his contract period or twelve
31 months, whichever period is longer;

33 b. That the Board could terminate Commissioner Hofschneider's employment
35 for cause upon 30 days advance written notice if: 1) Commissioner Hofschneider committed a
37 felony, fraud, or embezzlement, 2) if Commissioner Hofschneider became so disabled as to be
39 unable to substantially perform his duties, or 3) if Employee material breached his obligations
41 as set forth in the employment contract and the breach was not corrected within 45 days of
43 Commissioner Hofschneider reviewing written notice of the breach;
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1 c. That termination for cause shall be effective only after written notice of the
3 cause is provided to Commissioner Hofschneider and he fails to cure or correct the cause within
5 45 days;

7 d. Commissioner Hofschneider shall be paid the compensation provided in the
9 contract plus all benefits through the effective date of termination and during any appeal
11 proceedings up to a maximum of 60 days;

13 e. No basis for Commissioner Hofschneider to be placed on involuntary leave
15 without pay for any period of time; and

17 f. No basis for Demapan-Castro to take action by herself without prior formal
19 Board approval

21 8. Demapan-Castro executed the contract on behalf of the Board.

23 **Commissioner Hofschneider is Suspended With Pay for Fifteen Days**

25 9. On July 9, 2004, Demapan-Castro issued a "Notice of Suspension" to
27 Commissioner Hofschneider. The alleged basis of the suspension was for insubordination in
29 that Commissioner Hofschneider had allegedly caused document requisition No. FY 04-03 to
31 be altered without the Board's consent and that Commissioner Hofschneider allegedly departed
33 the July 2, 2004 MPLA Board meeting without permission. The July 9, 2004 suspension
35 notice made clear that the suspension was for fifteen working days and Commissioner
37 Hofschneider was to receive his full salary and benefits during the period of suspension.

39 **Other MPLA Board Members Inform Demapan-Castro That She Is Acting Illegally**

41 10. On July 9, 2004, Board Vice Chair Manuel P. Villagomez ("Villagomez") wrote
43 Demapan-Castro to inform her that:
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1 a. She was not empowered nor authorized to act on behalf of the entire then
3 four member Board to suspend Commissioner Hofschneider absent a formal Board vote to do
5 so;

7 b. That her factual account was wrong in that Commissioner Hofschneider was
9 fully authorized to reduce the drawdown request and, in fact, was acting prudently and in the
11 best interests of the MPLA in doing so; and

13 c. The Board meeting that she alleged Commissioner Hofschneider departed
15 without permission was not a Board meeting and Commissioner Hofschneider asked and was
17 authorized by Board members Villagomez and Nicolas M. Nekai ("Nekai") to leave the
19 meeting before he did so.

21
23 11. On July 12, 2004 Board member Nekai wrote Demapan-Castro to explain that:

25 a. She was not authorized by the other Board members to suspend
27 Commissioner Hofschneider;

29 b. That the actions alleged in her July 9, 2004 suspension do not rise to the
31 level warranting suspension;

33 c. That Commissioner Hofschneider was authorized by Board members Nekai
35 and Villagomez to leave the meeting; and

37 d. That Commissioner Hofschneider's adjustment to requisition No FY 04-03
39 was merely made because the Commonwealth Development Authority ("CDA") required it in
41 order for CDA and MPLA to remain in compliance with the bond indenture agreement and
43 was far from an illegal or improper act.
45
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Others Explain To Demapan-Castro Why She Is Wrong and the AGO Gets Involved But She Refuses To Reconsider

12. On July 13, 2004, CDA Chairman Sixto Igisomar wrote Nekai to explain that the adjustment made to requisition No. FY 04-03 was required by NMI Public Law 13-56 and the bond indenture agreement. Thus, CDA agreed that Commissioner Hofschneider acted properly in taking the action that Demapan-Castro had suspended him for.

13. On July 13, 2004, Commissioner Hofschneider wrote CNMI Attorney General Pam Brown to ask her office to look into the issues that Demapan-Castro had raised in her July 9, 2004 suspension notice concerning requisition FY 04-03.

14. On July 13, 2004, Villagomez and Nekai wrote Commissioner Hofschneider to inform him that the Board was endeavoring to solve its internal differences concerning Demapan-Castro's "independent adverse decision" and that he was to continue reporting to work and carrying out his responsibilities in managing the MPLA. Demapan-Castro and the other Board member, Mrs. Benita Manglona were provided a copy of the letter.

15. On July 14, 2004, Commissioner Hofschneider wrote Demapan-Castro to explain to her why her understanding of the facts surrounding the situation were incorrect and why he did not violate any laws, regulations, agreements, or directives.

16. On July 15, 2004, Demapan-Castro again wrote Commissioner Hofschneider to inform him that he was not to return to the office, reiterating that he was suspended with pay until July 29, 2004, and indicating that any further violations of her directive would result in his suspension being changed to one without pay.

17. On July 19, 2004, Villagomez wrote Demapan-Castro and the other members of the Board to propose that they meet with the Commissioner in an attempt to reconcile their disagreements.

1 18. On the same day, July 19, 2004, Demapan-Castro wrote the CNMI Attorney
3 General and the Secretary of Finance asking that they “promptly” review the situation
5 regarding requisition FY 04-03.

7 19. Demapan-Castro evidently had already made up her mind to carry out her will,
9 regardless of the facts and people that clearly indicated that she was wrong, what the other
11 Board members thought, and regardless of the Commissioner’s rights, because she hand wrote
13 on Villagomez’s July 19, 2004 letter “over my dead body.”

15 **Demapan-Castro Explains That She Believes That She Is The Board and Can Act**
17 **Unilaterally and Without Their Approval**

19 20. On the same day, July 19, 2004, Demapan-Castro wrote Villagomez back to
21 claim that she believed that she had been delegated “. . . full and complete authority to
23 exercise the administrative powers granted to the Board pursuant to P.L. 12-33 as amended”
25 by means of an “October 30, 2003” (sic) memorandum that was allegedly ratified at the
27 “August 14, 2004” (sic) Special Board Meeting and, thus, could do whatever she wanted, with
29 or without the consent of the rest of the Board and without having to conduct a meeting.

31 21. Of course, Demapan-Castro’s theory ignores the clear requirements of the
33 CNMI’s Open Government Meetings and Records Act (CNMI Public Laws 8-41, 9-2, and 10-
35 82) (hereinafter referred to as the “OGA”) and Section 103 (e) of CNMI Public Law 12-33, as
37 amended by CNMI PL 12-71, which states: “the Board shall act only by the affirmative vote
39 of the majority of the five [MPLA Board Members].”

41 22. The “October 30, 2003” memorandum referred to by Demapan-Castro in her July
43 19, 2004 correspondence to Villagomez was actually dated July 30, 2003 and the “August 14,
45 2004” Special Board Meeting referred to by Demapan-Castro was actually an August 14,
47 2003 Special Board Meeting.
49

1 23. In addition, Demapan-Castro's theory ignores the fact that the manner in which
3 the purported delegation was allegedly executed and adopted violated the OGA as well in the
5 following manners:

- 7 a. The July 30, 2003 correspondence was not executed in a public meeting;
9 b. The agenda and notice and posting and delivery of the agenda and notice for
11 the August 14, 2003 Special Meeting was fatally defective;
13 c. The alleged ratification of the July 30, 2003 correspondence was merely the
15 ratification of an illegal act performed in violation of the OGA and
17 ratifications in such circumstances are considered void; and
19 d. The Minutes from the August 14, 2003 Special Meeting make clear that the
21 Board did not provide the Demapan-Castro with the power that she purports
23 to have been provided.
25

27 24. "Any action taken at meetings failing to comply with the provisions of [the
29 OGA] shall be null and void." 1 CMC § 9907.

31 25. In addition, on July 22, 2004, Board member Villagomez wrote Demapan-Castro
33 notifying her that, effective immediately, he was withdrawing his delegation of authority to
35 her over administrative matters.
37

39 **Demapan-Castro Retaliates By Suspending Commissioner Hofschneider Without Pay
Pending the Outcome of an AGO/Finance Review**

41 26. On July 28, 2004, Demapan-Castro wrote Commissioner Hofschneider to inform
43 him that she had written the CNMI Attorney General's Office and the Secretary of Finance on
45 July 19, 2004 to request them to review and provide an opinion concerning requisition
47 Request FY 04-03 and that she had not yet received their response to her inquiry. Demapan-
49 Castro informed Commissioner Hofschneider that as a result, effective July 30, 2004, she was

1 placing him on leave without pay until an "official opinion is received from both agencies."
3 She further notified Commissioner Hofschneider that the suspension was continuing for the
5 same reasons stated in her July 9, 2004 suspension memorandum and that he could appeal her
7 decision pursuant to the Commonwealth Administrative Procedure Act. A copy of Demapan-
9 Castro's July 28, 2004 Notice of Continuing Suspension is attached hereto as Exhibit "B."

11 27. The contract provides no basis to suspend Commissioner Hofschneider without
13 pay and Demapan-Castro did not provide Commissioner Hofschneider with an opportunity to
15 cure or correct before placing him on indefinite suspension without pay.
17

19 **Demapan-Castro Refuses to Cooperate With The AGO/Finance Review That She**
21 **Requested and That She Says Commissioner Hofschneider Must Wait For The Results**
From before Returning to Work

23 28. On August 3, 2004, Attorney General Pam Brown wrote Demapan-Castro to
25 inform her that the Secretary of Finance had agreed to look into the situation and to request
27 that she "identify the specific procedures you believe to have been violated, including the
29 specific laws and/or governing instruments which support [her allegations of impropriety]."

31 29. Despite the fact that Demapan-Castro's July 19, 2004 request to the Attorney
33 General and Secretary of Finance requested that they conduct their review "promptly,"
35 Demapan-Castro in the more than three months since she was requested by the AG, has failed
37 to respond in any manner to the Attorney General's August 3, 2004 request that she identify
39 exactly what she is alleging Commissioner Hofschneider did wrong.
41

43 30. Meanwhile, Demapan-Castro's unilateral suspension of Commissioner
45 Hofschneider from employment without pay continued indefinitely from July 28, 2004
47 pending the outcome of the AGO/Finance review.
49

Demapan-Castro Reneges on Her Settlement Agreement

31. On August 26, 2004, Demapan-Castro and Commissioner Hofschneider met in order to determine whether they could settle the matter upon mutually agreed upon terms. They reached an agreement on all terms, whereby Commissioner Hofschneider would return to work immediately and receive his back pay, subject only to meeting the next morning to review and sign the letter documenting the terms that Commissioner Hofschneider would prepare that evening.

32. On the morning of August 27, 2004, Commissioner Hofschneider and Demapan-Castro met to review and sign the letter prepared by Commissioner Hofschneider. Demapan-Castro agreed that the letter accurately reflected the full and complete agreement they reached the previous evening but now refused to sign it unless Commissioner Hofschneider signed two documents that Demapan-Castro had obviously had her attorney prepare whereby Commissioner Hofschneider would admit to wrongdoing (directly contrary to the agreement that had been reached the night before) and a broad pledge of confidentiality on almost all MPLA related matters.

The Federal Lawsuit is Filed, The APA Suspension Cause of Action is Dismissed and Transferred to This Complaint, and Commissioner Hofschneider Requests Release of His Annual Leave

33. On that same day, August 27, 2004, within 30 days of the delivery of the July 28, 2004, indefinite suspension without pay notice to Commissioner Hofschneider, the original Complaint in the Federal lawsuit described in paragraph 6. of this Complaint was filed.

34. Besides the § 1983 Civil Rights and other causes of action, it included a timely appeal of Demapan-Castro's Suspension of Commissioner Hofschneider without pay pursuant to the CNMI's Administrative Procedures Act.

1 35. Such APA appeal was voluntarily dismissed without prejudice earlier in the day
3 on November 8, 2004, the same day as the filing of this Complaint.

5 36. On September 9, 2004, Commissioner Hofschneider wrote MPLA to request
7 immediate release of payment for all but 40 hours of his accrued annual leave (237 hours)
9 pursuant to Section 4.a.4 of his Contract.

11 **Three of The Five Board Members Order Commissioner Hofschneider Back to Work**
13 **But Demapan-Castro and Her Attorneys Refuse To Allow Him Back**

15 37. On or about September 17, 2004, Villagomez, Nekai, and newly confirmed
17 Board member Felix A. Sasamoto ("Sasamoto") wrote Demapan-Castro and Commissioner
19 Hofschneider to inform him that they believed that Demapan-Castro's actions related to
21 Commissioner Hofschneider's employment were made without authority, factually
23 unsupportable, and void. The letter directed Commissioner Hofschneider to return to work
25 immediately and for MPLA Accounting Division to issue a check for back pay. Exhibit "C."

27 38. On September 20, 2004, MPLA attorney Alan Lane wrote to Villagomez, Nekai,
29 and Sasamoto to inform them that Commissioner Hofschneider could not return to work
31 absent a formal Board meeting and vote. Of course, Mr. Lane failed to recognize that this was
33 precisely one of the points that the three Board members had made in their letter; Board
35 members, particularly Board members acting alone, cannot act on behalf of the Board absent a
37 proper vote at a properly noticed Board meeting.

39 39. On September 20 and 21, 2004, Commissioner Hofschneider returned to work as
41 directed by the three board members.

43 40. On the same day, September 21, 2004, Defendant caused one of her attorneys,
45 Mark A. Smith, to write Commissioner Hofschneider's attorney to inform him that
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1 Commissioner Hofschneider was trespassing by entering the MPLA premises and that they
3 would "seek legal remedies" if he returned.

5 **The Tables Are Turned: AGO and Finance Are Tired of Demapan-Castro's Refusal to**
7 **Cooperate, Demapan-Castro Surreptitiously Receives A Copy of the Draft AGO/Finance**
9 **Report Which Exonerates Commissioner Hofschneider, and She learns That OPA is**
Now Apparently Investigating Her Illegal Actions

11 41. On September 28, 2004, CNMI Assistant Attorney General Ben Sachs wrote
13 Demapan-Castro's attorney to remind her that AGO was requesting her to identify precisely
15 what wrongdoing she was accusing Commissioner Hofschneider of. The letter also explained
17 that although the AGO had requested such information from her more than six weeks before
19 and she had previously requested an expedited review of the situation, AGO had yet to receive
21 her response.

23 42. Upon information and belief, on or about September 29, 2004, more than one of
25 Demapan-Castro's attorneys (Demapan-Castro has at least four attorneys representing her
27 interests in this matter) met with representatives of the CNMI Office of the Public Auditor
29 ("OPA"). OPA was conducting a review of the situation in order to determine whether any
31 CNMI Laws or MPLA Regulations had been violated pursuant to a request of the Attorney
33 General's Office. At that meeting, the attorneys were informed that Demapan-Castro's
35 conduct related to Commissioner Hofschneider's employment was being investigated by OPA.
37 Serious concerns related to Demapan-Castro's conduct were raised at the meeting by OPA.
39 News of this investigation was upsetting to Demapan-Castro because she apparently believed
41 that only Commissioner Hofschneider's actions were being reviewed by the AGO and
43 Department of Finance..
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1 43. On or about October 6, 2004, Demapan-Castro surreptitiously received a copy of
3 the Department of Finance's draft report. Such report effectively exonerated Commissioner
5 Hofschneider of misconduct by indicating that his actions were reasonable and lawful related
7 to the drawdown.

9 44. Although Demapan-Castro was provided a copy of the October 6, 2004 report,
11 apparently by someone within the Department of Finance, neither Commissioner
13 Hofschneider nor the other members of the Board, were provided a copy by Finance or
15 Demapan-Castro. Apparently, she does not want them to know about it because it proves
17 what Commissioner Hofschneider and the other members of the Board have been saying all
19 along, she is wrong and Commissioner Hofschneider was not deserving of any discipline
21 whatsoever.

25 **Commissioner Hofschneider Writes Demapan-Castro To Indicate That Her One-Month**
27 **Delay In Releasing His Annual Leave Payment Reeked of Retaliation**

29 45. On October 7, 2004, Commissioner Hofschneider's counsel wrote Demapan-
31 Castro's counsel regarding Demapan-Castro's lack of response to Commissioner
33 Hofschneider's September 9, 2004 request for payment for 237 hours of annual leave. The
35 letter made clear that if the payment was clearly warranted under the contract and that if it was
37 not received by October 15, 2004, that Commissioner Hofschneider would file an additional
39 count in the Federal lawsuit for retaliation. To date, MPLA has not paid Commissioner
41 Hofschneider for any of his annual leave.

43 **Demapan-Castro's Final Desperate Act? She Terminates Commissioner Hofschneider**

45 46. On October 11, 2004, Demapan-Castro caused to be delivered to Commissioner
47 Hofschneider a "Notice of Termination" dated October 8, 2004. A copy is attached hereto as
49 Exhibit "D."

1 57. Not more than thirty days had elapsed from the date of the issuance of the
3 suspension without pay letter until Commissioner Hofschneider appealed the suspension
5 without pay decision to the Federal Court and not more than thirty days have passed since that
7 appeal was dismissed and re-filed in this Complaint pursuant to 28 U.S.C. §1367(d).

9 58. Not more than 30 days have elapsed since the issuance of the termination letter.

11 59. Commissioner Hofschneider is bringing this matter to this Court as an
13 administrative appeal from Demapan-Castro's decisions. First and foremost, Commissioner
15 Hofschneider reiterates his position that Demapan-Castro lacked the authority to order his
17 suspension without pay and termination. Thus, those acts are void. (See Counts II and III
19 below). Although Section 10.b. of Commissioner Hofschneider's contract appears to *allow* him
21 to appeal Demapan-Castro's decision, it in no way *mandates* such an appeal. Therefore, the
23 exhaustion doctrine is not applicable and direct appeal to this Court is allowed.

25 60. In addition, exhaustion is not required because Demapan Castro lacked the
27 authority to suspend or terminate Commissioner Hofschneider in the first place and it would be
29 futile for Commissioner Hofschneider to appeal because Demapan-Castro has repeatedly
31 demonstrated her bad faith towards Commissioner Hofschneider's rights throughout the
33 process and would only use an appeal to delay or compromise an objective review of the facts
35 and related law.

37 61. Commissioner Hofschneider requests, in part, that the Court hold the suspension
39 and termination decisions issued by Demapan-Castro were arbitrary, capricious, an abuse of
41 discretion, not in accordance with law, in excess of statutory authority, or limitations, and short
43 of statutory rights, and unwarranted by the facts as provided in 1 CMC § 9112(f)(2).

45 62. Therefore, Commissioner Hofschneider prays for relief as set forth below in
47 Section VI.
49

1 **COUNT II: Open Government Meetings and Records Act Violations**

3 63. Commissioner Hofschneider incorporates herein by reference as if set forth in
5 full paragraphs 1 through 54.

7 64. Demapan-Castro's purported suspension without pay and termination of
9 Commissioner Hofschneider did not comply with the OGA in that:

- 11 a. They were actions only the Board could take;
13 b. They were made privately by Demapan-Castro and were not made in a
15 Board meeting properly noticed and open to the public;
17 c. Were made without a Board vote at such a meeting.
19

21 65. To the extent that Demapan-Castro relies upon the purported July 30, 2003
23 delegation of Board power, that delegation and the subsequent attempt to ratify it were in
25 violation of the OGA in the following manners:

- 27 a. The intent of the delegation was in direct violation of the intent of the
29 OGA;
31 b. Only the Board possesses the power purported to be given the Demapan-
33 Castro in the purported delegation;
35 c. The July 30, 2003 correspondence was not executed in a public meeting;
37 d. The agenda and notice and posting and delivery of the agenda and notice
39 for the August 14, 2003 Special Meeting was defective in that it was not posted and delivered
41 to Board members in the manner required by law and did not include the July 30, 2003
43 correspondence on the agenda or the call of business to be conducted;
45

1 e. The alleged ratification of the July 30, 2003 was merely the ratification of
3 an illegal act performed in violation of the OGA and ratifications in such circumstances are
5 considered void at law; and

7 f. The Minutes from the August 14, 2003 Special Meeting make clear that
9 the Board did not ratify and provide Demapan-Castro with the power that she purports to have
11 been provided.

13 66. "Any action taken at meetings failing to comply with the provisions of [the
15 OGA] shall be null and void." 1 CMC § 9907.

17 67. Therefore, Commissioner Hofschneider prays for relief as set forth below in
19 Section VI.
21

23 **COUNT III: Violation of CNMI Public Law 12-33**

25 68. Commissioner Hofschneider incorporates herein by reference as if set forth in
27 full paragraphs 1 through 54.

29 69. The parties to Commissioner Hofschneider's employment contact are the Board
31 and Commissioner Hofschneider.

33 70. Section 103 of CNMI Public Law 12-33, as amended by CNMI Public Law 12-
35 71, explains the set up of the Board and its powers.

37 71. The Board is to include a representative from each of the islands of Tinian and
39 Rota and three representatives from Saipan

41 72. At least one member shall be a woman and one of Carolinian descent.

43 73. Importantly, "The Board shall act only by the affirmative vote of the majority of
45 the five directors." (PL 12-33, §103(e)).
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1 74. Demapan-Castro's suspension without pay and termination of Commissioner
3 Hofschneider failed to comply with the clear requirements of Section 103.

5 75. In addition, to the extent that she relies upon the purported July 30, 2003
7 delegation and purported August 14, 2003 ratification of such purported delegation, such
9 delegation and ratification violate the language and intent of Section 103 as well.

11 76. Therefore, Commissioner Hofschneider prays for relief as set forth below in
13 Section VI.

15
17 **COUNT IV: Breach of Contract**

19 77. Commissioner Hofschneider incorporates herein by reference as if set forth in
21 full paragraphs 1 through 54.

23 78. Demapan-Castro's actions violated the terms and conditions of the contract
25 between Commissioner-Hofschneider and the Board in the following manner:

- 27 a. only the Board, acting as a whole, may take action related to the contract;
29 b. the contract contains no basis for suspension without pay;
31 c. the purported bases for the termination were not for any of the
33 enumerated reasons listed in Section 10(b) of the contract;
35 d. the suspension without pay and termination notices failed to provide 30
37 days advance written notice;
39 e. the suspension without pay and termination notices failed to provide the
41 required 45 days for Commissioner Hofschneider to cure and/or correct the alleged
43 deficiencies;
45 f. the termination notice failed to give sufficient detail as to counts 1, 2, 3,
47 and 5 so as to constitute notice as required by the contract;
49

1 g. none of the alleged termination bases set forth in the notice are provisions
3 contained in the employment;

5 h. the termination notice failed to cite what provisions of the contract
7 corresponded with the alleged bases for termination;

9 i. the termination notice failed to provide the compensation and all benefits
11 due Commissioner Hofschneider through the date of purported termination;

13 j. Demapan-Castro has refused to timely pay Commissioner Hofschneider
15 for 237 hours of accrued annual leave as requested by him;

17 k. she and her attorneys and agents actively interfered with Commissioner
19 Hofschneider's ability to cure and/or correct by refusing him access to the workplace and
21 certain rooms within the workplace;

23 l. failure to investigate the purported bases adequately;

25 m. the actions complained of were already fully disciplined;

27 n. failure to follow commitment to abide by conclusions of AGO/Finance
29 review;

31 o. undermined an important public policy, namely the ability of the entire
33 MPLA board to make a decision;

35 p. failure to cooperate with the AGO/Finance review;

37 q. actively lobbying bond counsel, CDA, and the bond trustee to indicate
39 their disagreement with Commissioner Hofschneider's actions related to the drawdown
41 request;

43 r. refusal to pay Commissioner Hofschneider the salary and benefits to
45 which he is contractually entitled;

s. some of the bases alleged in the notice were either ordered by what appeared to be a majority of the members of the Board or agreed to by relevant and authorized board members or MPLA employees; and

t. the covenant of good faith and fair dealing was repeatedly violated (See Count V. below).

79. Therefore, Commissioner Hofschneider prays for relief as set forth below in Section VI.

COUNT V: Violation of Covenant of Good Faith and Fair Dealing

80. Commissioner Hofschneider incorporates herein by reference as if set forth in full paragraphs 1 through 54 and 78.

81. The implied covenant of good faith and fair dealing is contained in every government contract. *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 140 (1992). It has been read into government contracts for over 100 years. *United States v. Smith*, 94 U.S. 214 (1876) (United States is liable for damages resulting from interference with contractor's work).

82. The RESTATEMENT (SECOND) OF CONTRACTS § 205 implies a promise (or *covenant*) by each party to a contract to deal fairly and in good faith.¹ "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment c. states that bad faith may consist of: "abuse of a power to specify terms," and "failure to cooperate in the other party's performance." Comment e. states that this obligation also "extends to the assertion, settlement, and litigation of contract claims and defenses." The

¹ In the Commonwealth, the rules of the Restatement apply in the absence of statutory law. *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46 (1993).

1 “conjuring up a pretended dispute, asserting an interpretation contrary to one’s own
3 understanding” and “abuse of a power to determine compliance” are all examples of bad faith.

5 83. Demapan-Castro’s acts, and the acts of her agents and attorneys that were done
7 at her direction, as set forth above, violated her duty of good faith and fair dealing to
9 Commissioner Hofschneider, owed by her both personally and as a member of the Board.

11 84. Therefore, Commissioner Hofschneider prays for relief as set forth below in
13 Section VI.
15

17 **COUNT VI: Interference with Contract and Economic Relations**

19 85. Commissioner Hofschneider incorporates herein by reference as if set forth in
21 full paragraphs 1 through 54.

23 86. Demapan-Castro is a third party to the contract entered into between
25 Commissioner Hofschneider and the Board.

27 87. Demapan-Castro, and her attorneys and agents at her direction, in the manners
29 set forth above, intentionally and improperly interfered with the performance of the contract by
31 inducing or otherwise causing the Board not to perform the contract.

33 88. Demapan-Castro is, therefore, liable to Commissioner Hofschneider for his
35 damages.

37 89. Therefore, Commissioner Hofschneider prays for relief as set forth below in
39 Section VI.
41

43 **COUNT VII: Taxpayer Action**

45 90. Commissioner Hofschneider incorporates herein by reference as if set forth in
47 full paragraphs 1 through 54.
49

91. Demapan-Castro continues to expend public funds, primarily in the form of her legal defense fees and costs, in order to pursue her personal vendetta against Commissioner Hofschneider and to defend her unilateral and illegal actions.

92. In addition, other expenses are being incurred, such as salaries and benefits for newly hired employees who would not be necessary had Demapan-Castro simply complied with the law.

93. The Board, through inaction, either intentional or unintentional, has allowed these expenditures to continue, despite the fact that Demapan-Castro actions are illegal and clearly beyond the powers provided her by law.

94. Such expenditures are expenditures of public funds for other than public purposes and constitute a breach of her fiduciary duty as a member of the Board.

95. Therefore, Commissioner Hofschneider prays for relief as set forth below in Section VI.

VI. PRAYERS FOR RELIEF

For these reasons, Commissioner Hofschneider asks for judgment against Defendants for the following:

- a. An order determining that Demapan-Castro's suspension without pay and termination of Commissioner Hofschneider were illegal and null and void;
- b. An order directing Demapan-Castro and her attorneys and other agents to cease and desist from taking actions depriving Commissioner Hofschneider of his lawful position as the MPLA Commissioner, and the salary and benefits that spring from that position;
- c. Reversal of Demapan-Castro's decisions to suspend without pay and terminate Commissioner Hofschneider;

- d. Commissioner Hofschneider's actual damages;
- e. Punitive damages in the amount of \$1,750,000.00
- f. Prejudgment and post-judgment interest;
- g. Costs of suit including attorneys' fees;
- h. A reasonable amount relative to the public benefit of this suit; and
- i. All other relief that the court deems appropriate.

Dated this 8th day of November 2004.

Respectfully submitted,


SEAN E. FRINK